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RECLAMATION

# Endangered Species Act Regulations Updates

Stakeholder Virtual Workshop 2020



# Endangered Species Act (ESA) Regulations Changes

- August 27, 2019 - U.S. Fish and Wildlife Service and National Marine Fisheries Service issued 3 final rules in the Federal Register

## Key Changes:

- [Section 4](#) Regulations – clarifies portions of ESA concerning the procedures and criteria used for listing or removing species and designating critical habitat
- [Section 7](#) Regulations – changes to definitions and certain procedures related to consultations
- [Section 9](#) Regulations – modifies approach to Threatened species protections



# Section 4 (Listing, Delisting or Reclassifying Species)

- Creates a regulatory framework for the phrase “foreseeable future”
- Clarifies when critical habitat listing is not prudent
- Provides more concise circumstances for listing of critical habitat in unoccupied habitat



# *Foreseeable Future, changes...*

- In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the *"foreseeable future"*:

"The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the conditions potentially posing a danger of extinction in the foreseeable future threats and the species' responses to those threats are probable likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time, but may instead explain the extent to which they can reasonably determine that both the future threats and the species' responses to those threats are probable."



# Critical Habitat Designation – Not Prudent

Designation may be not prudent when:

- Causes increased degree of threat;
- Habitat impacts not a threat or threats to habitat stem solely from causes not able to be addressed by section 7(a)(2) of the Act;
- Areas within U.S. jurisdiction provide no more than negligible conservation value for species occurring primarily outside U.S. jurisdiction;
- No areas meet definition; or
- The Secretary otherwise determines critical habitat is not prudent.



# Unoccupied Critical Habitat

“...When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.”



# Section 7 (Consultation)

The revisions:

- Address alternative consultation mechanisms
- Revise the definitions of “destruction or adverse modification” and “effects of the action”



# Alternative Consultation Mechanisms

- 1) *Programmatic Consultation* - addresses an agency's multiple actions on a program, region or other basis
- 2) Two new provisions - the Services can adopt all or part of a federal agency's initiation package for section 7 consultations or its own analysis for section 10(a) HCPs when writing biological opinions
- 3) New provision - "*Expedited Consultations*"





# ***Destruction and Adverse Modification***

Means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species. ~~Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.~~



# *Revised “Effects of the action”*

Are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (Sec § 402.02)



# 50 CFR402.13 *Informal consultation*

- Addition of the 60-day timeline for concurrence letters
- May be extended upon mutual consent of the Service, Federal agency, and applicant (if involved), but shall not exceed 120 days total
- The changes do not alter review and response to biological assessments prepared for actions that fit the regulatory definition of “major construction activities”. For those consultations, the response would be required within 30 days as specified at 402.12 (j) and (k)



# Section 9 (Prohibitions-FWS Only)

- Rescinds current regulations that automatically apply prohibitions for endangered species to threatened species.
- Protections for species listed as threatened in the future will be made on a case-by-case basis tailored to what is necessary and advisable for that species (i.e., via a species-specific 4(d) rule).
- Aligns the Fish and Wildlife Service with the National Marine Fisheries Service practice.





# Examples of 4(d) rules

- A species specific 4(d) rule for the coastal California gnatcatcher on December 10, 1993 (58 FR 65088). In that 4(d) rule, FWS determined that activities that met the requirements of the State of California's Natural Communities Conservation Plan for the protection of coastal sage scrub habitat would not constitute violations of section 9 of the Act.
- Similarly, in 2016, FWS finalized the listing of the Kentucky arrow darter with a species-specific 4(d) rule that exempts take as a result of beneficial in-stream habitat enhancement projects, bridge and culvert replacement, and maintenance of stream crossings on lands managed by the U.S. Forest Service in habitats occupied by the species (81 FR 68963, October 5, 2016).





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